

LEXSEE 2008 U.S. APP. LEXIS 5600

**UNITED STATES OF AMERICA, Plaintiff - Appellee, v. SERGIO
HERNANDEZ-AMESCUA, a/k/a Sergio Amescua, Sergio Amezcua, Raul
Hernandez, Roberto Hernandez, Sergio Amulscua Hernandez, Sergio Amezcua
Hernandez, Raul Hernandez-Rodriguez, Raul Rodriguez, Defendant - Appellant.**

No. 06-50238

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

2008 U.S. App. LEXIS 5600

February 26, 2008 **, Submitted

** The panel unanimously finds this case suitable for decision without oral argument. *See* Fed. R. App. P. 34(a)(2).

March 10, 2008, Filed

NOTICE: PLEASE REFER TO FEDERAL RULES OF APPELLATE PROCEDURE RULE 32.1 GOVERNING THE CITATION TO UNPUBLISHED OPINIONS.

PRIOR HISTORY: [*1]

Appeal from the United States District Court for the Central District of California. D.C. No. CR-04-01513-CAS-1. Christina A. Snyder, District Judge, Presiding.

DISPOSITION: AFFIRMED; REMANDED with instructions to correct the judgment.

COUNSEL: For UNITED STATES OF AMERICA, Plaintiff - Appellee: Sean K. Lokey, Esq., Attorney, Lawrence S. Middleton, Esq., Attorney, Michael J. Raphael, Esq., Attorney, USLA - OFFICE OF THE U.S. ATTORNEY, Los Angeles, CA.

For SERGIO HERNANDEZ-AMESCUA, a/k/a Sergio Amescua, Sergio Amezcua, Raul Hernandez, Roberto Hernandez, Sergio Amulscua Hernandez, Sergio Amezcua Hernandez, Raul Hernandez-Rodriguez, Raul Rodriguez (-: Reg. # 67448-189), Defendant - Appellant: Myra Mossman, Esq., Santa Barbara, CA.

JUDGES: Before: BEEZER, FERNANDEZ, and McKEOWN, Circuit Judges.

OPINION

MEMORANDUM *

* This disposition is not appropriate for publication and is not precedent except as provided by *9th Cir. R. 36-3*.

Before: BEEZER, FERNANDEZ, and McKEOWN, Circuit Judges.

Sergio Hernandez-Amescua appeals from his 50-month sentence for illegal reentry in violation of 8 U.S.C. § 1326. We have jurisdiction under 28 U.S.C. § 1291, and we affirm.

Hernandez-Amescua contends that the maximum sentence that could be imposed is two [*2] years because the constitutional holding of *Almendarez-Torres v. United States*, 523 U.S. 224, 118 S. Ct. 1219, 140 L. Ed. 2d 350 (1998), is inconsistent with Supreme Court jurisprudence. This contention is foreclosed. *See United States v. Salazar-Lopez*, 506 F.3d 748, 751 n.3 (9th Cir. 2007).

Hernandez-Amescua also contends that his admission that his prior conviction was an aggravated felony must be vacated because the district court did not inform him of the elements of an aggravated felony under *Fed. R. Crim. P. 11*. He further contends that the district court accepted his admission without a sufficient factual

2008 U.S. App. LEXIS 5600, *2

basis. This contention is foreclosed. *See United States v. Covian-Sandoval*, 462 F.3d 1090, 1096 (9th Cir. 2006), *cert. denied*, 127 S. Ct. 1866, 167 L. Ed. 2d 355 (2007) (prior convictions do not need to be alleged in the indictment, proven beyond a reasonable doubt or admitted by the defendant).

In accordance with *United States v. Rivera-Sanchez*, 222 F.3d 1057, 1062 (9th Cir. 2000), we remand the case

to the district court with instruction that it delete from the judgment the incorrect reference to § 1326(b)(2). *See United States v. Herrera-Blanco*, 232 F.3d 715, 719 (9th Cir. 2000) (remanding sua sponte to delete the reference to [*3] § 1326(b)).

AFFIRMED; REMANDED with instructions to correct the judgment.